IN THE SUPREME COURT OF MISSOURI

EDWARD GRATTAN and KATHERINE M. GRATTAN, Plaintiffs-Appellants, vs. UNION ELECTRIC COMPANY, Defendant-Respondent.	)	Appeal No. SC 85851

Appeal from the Circuit Court of the City of St. Louis

Division No. 1

The Honorable Thomas C. Grady, Judge

SUBSTITUTE BRIEF OF RESPONDENT
UNION ELECTRIC COMPANY

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ATTORNEYS FOR RESPONDENT
UNION ELECTRIC COMPANY

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SUBSTITUTE BRIEF OF RESPONDENT
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JURISDICTIONAL STATEMENT

Plaintiffs Edward Grattan and Katherine M. Grattan appeal from a summary judgment in favor of defendant Union Electric Company. The Missouri Court of Appeals, Eastern District, affirmed the summary judgment in favor of defendant. This Court granted transfer on March 30, 2004, on plaintiffs' application, and has jurisdiction to decide this appeal, pursuant to Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

This is an appeal from a summary judgment in favor of defendant Union Electric Company. Plaintiff Edward Grattan seeks damages as a result of a February 3, 1992 incident in which a trash-hauling truck left the pavement of Ladue Road near its intersection with Babler, and rolled over, breaking a utility pole more than nine feet off

the traveled portion of the road, and bringing down electrical lines, some of which landed on Mr. Grattan's automobile. (L.F. 12-14). Although Mr. Grattan had no burns, he claims that he sustained an electrical shock when he reached up to open the T-top of his vehicle in an effort to exit the car. (L.F. 68-69). He alleges that this aggravated a pre-existing heart condition and caused various injuries, including medical complications that he attributes to the February 3, 1992 incident. (L.F. 14). His wife, Katherine M. Grattan, alleges loss of consortium. (L.F. 15).

The pleadings, depositions, affidavits and exhibits submitted to the trial court in connection with Union Electric's Motion for Summary Judgment showed the following facts.

The February 3, 1992 Incident

On the afternoon of February 3, 1992, Daniel Pogue, an employee of Waste Management of Missouri, Inc., doing business as Environmental Industries, was driving his employer's trash-hauling truck east on Ladue Road toward I-270. (L.F. 89, 92, 106). Near Babler Road, the truck's right front steering tire left the pavement, a drop-off of five to six inches, due to what Mr. Pogue described as a moment of inattention on his part. (L.F. 97, 99-100, 103, 105). He recalled looking down in the area of the cab immediately before the tire's leaving the road but did not recall further details. (L.F. 106-07). He steered to the left, brought the right front tire back on the pavement, but then lost control and went off on the right or south side of the road. (L.F. 49-50, 104-05, 109). The trash truck rolled over, damaging a picket fence, breaking a utility pole and landing upright on

its tires in a grassy area off the road. (L.F. 109-11). The utility pole was approximately 9 feet, 7 inches off the traveled portion of the road and had a pole date of 1963, indicating that it was installed in 1963 or 1964. (L.F. 125-26, ¶¶ 3, 4, 7).

Plaintiff Edward M. Grattan was traveling west on Ladue Road and saw the trash truck overturn, hit a pole, roll over 360 degrees, and come up on its wheels. (L.F. 54). Four other poles broke. (L.F. 54-55, 125-26). The top of a pole fell six to seven feet in front of Mr. Grattan's car, and six wires landed on the car. (L.F. 56-57). Mr. Grattan described his car as "essentially enveloped by wires." (L.F. 58). He testified that he had the windows open that day and some molten metal entered the car and burned holes in his suit coat, which was lying on the passenger seat, and in the floor mats. (L.F. 61). Because of the electric wires, Mr. Grattan could not be removed from the car immediately, and he reached up with his left hand to unlatch the T-top of his vehicle in an effort to exit through the top. (L.F. 63-64). He has testified that as he reached up to the T-top, there was a flash of bright orange-ish light, and his body jumped and his head hit the T-top. (L.F. 68-69, 72).

Although he cannot say that he sustained any burn injuries, and he was not treated for burns following the incident, Mr. Grattan believes that he sustained an electric shock when he touched the T-top. (L.F. 64). Prior to this incident, he had experienced atrial fibrillation since June 1990. (L.F. 79). He believes that when he reached out to touch the T-top lever, he sustained an electrical shock that caused his heart to go into chronic atrial

fibrillation. (L.F. 79). He was treated with Amiodarone, which he says brought about peripheral neuropathy and chronic fatigue. (L.F. 79). Mr. Grattan has testified that five years after the accident, in March 1997, after walking in the desert in Arizona, he noticed some pebbles in his shoe and a wound in the big toe of his right foot. (L.F. 82-83). The wound did not heal and became infected, and ultimately the right leg was amputated that became infected below the knee. (L.F. 81-82, 122). Mr. Grattan also lost a toe on the left foot in February 1999 after he stubbed his toe and it became infected. (L.F. 82). He attributes both infections and the subsequent amputations to peripheral neuropathy, which he claims was caused by the Amiodarone, which was prescribed for the chronic atrial fibrillation, which he attributes to an electric shock. (L.F. 79-83).

Plaintiffs' Claims

Plaintiffs originally filed their lawsuit in the Circuit Court of the City of St. Louis as Cause No. 972-00235, but dismissed without prejudice on May 12, 1999. (L.F. 13, ¶ 3; L.F. 16, ¶ 3). Plaintiffs filed the present action on April 13, 2000. (L.F. 12). They allege that Union Electric was negligent in "failing to adequately insulate or isolate said electrical lines" and "failing to adequately maintain, operate, install and monitor its equipment and electrical lines and in failing to adequately equip and maintain adequate ground-fault, or circuit interrupting equipment to de-energize said electrical lines in the event of a fault, disruption of the lines, or falling onto the public streets and highways of the State of Missouri." (L.F. 13, ¶ 5).

The Motion for Summary Judgment

Union Electric moved for summary judgment on the grounds that, as a matter of law, the truck's leaving the traveled portion of the roadway and colliding with a utility pole was not reasonably foreseeable, Union Electric did not owe a duty to use circuit interrupting equipment or otherwise fuse for a fault current, and no act or omission on the part of Union Electric was a proximate cause of plaintiffs' alleged injuries and damages. (L.F. 20-22). Union Electric filed its Statement of Uncontroverted Facts (L.F. 23-27), supported by pleadings, deposition testimony and an affidavit. (L.F. 29-127).

Plaintiffs filed a response to Union Electric's motion, denying the statements made in the motion (L.F. 138-40), but did not address Union Electric's Statement of Uncontroverted Facts or set out additional facts in the manner prescribed by Rule 74.04(c)(2). Plaintiffs submitted portions of the depositions of their electrical and medical experts (L.F. 141-46, 154-58), a copy of the police report (L.F. 147-51) and a page from Union Electric's answers to interrogatories (L.F. 153).

The pages from plaintiffs' electrical expert's deposition indicate that although he accepts Union Electric's report that its circuit breaker operated through all of its cycles and locked out completely after 175 seconds, he also opines, solely on the basis of Mr. Grattan's testimony, that at some point between the first and the final lockout the line must have remained energized, in order for Mr. Grattan to receive a shock. (L.F. 146, Nabours Depo., pp. 85-87). He cannot identify the cycle in which he believes that occurred. (L.F. 146, Nabours Depo., p. 85). Plaintiffs' expert asserts that Union Electric

should have used distance and directional relays, in addition to inverse time relays, and should have had its reclosers set on cycles that would cause the line to lock out and remain de-energized within 60 seconds, rather than 175 seconds. (L.F. 143, Nabours Depo., pp. 62-64; L.F. 145, Nabours Depo., pp. 74-76; L.F. 146, Nabours Depo., pp. 86-88). Although he describes the relays he recommends as more sensitive, plaintiffs' expert acknowledges that "[a]ny detection system has a threshold and unless you exceed the detection system does not recognize that as being a fault." (L.F. 146, Nabours Depo., p. 88). Plaintiffs' expert cannot identify any specific utility that routinely uses distance and directional relays on its 34.5 Kv lines; in contrast, inverse time relays are widely used. (L.F. 145, Nabours Depo., pp. 75-76).

On March 4, 2003, the trial court granted summary judgment in favor of Union Electric, stating: "In sum, Defendant did not owe Plaintiffs a legal duty of care to take any special precautions against the collision which occurred in this case or any injury resulting therefrom. In Missouri, under *Clinkenbeard* and its progeny, there simply is no duty on the part of the utility company to take precautions against such an off-road collision with a utility pole, because in the absence of very limited and special circumstances (which have not been shown in this case), such a collision is considered not reasonably foreseeable. As a matter of law, the collision with the utility pole which resulted in Plaintiffs' injuries was not an event that was reasonably foreseeable to Defendant." (Judgment, App. Brief, p. A17; L.F. 179, 195).

Plaintiffs filed their Notice of Appeal on April 21, 2003. (L.F. 198). After briefing and argument, the Missouri Court of Appeals, Eastern District, issued its opinion on December 9, 2003, affirming the summary judgment in favor of defendant. The court held that "there was no basis for defendant to be charged with actual or constructive knowledge that there was a probability of injury." (Opinion, p. 5). Noting plaintiffs' attempt to create a fact issue concerning the circuit breaker system used by Union Electric, the court held that it could not be considered because it had not been set out as a controverted fact issue in the trial court in the manner required by Rule 74.04(c)(2). (Opinion, p. 6). The court concluded that: "All of plaintiffs' damages were caused by an off-road vehicle collision with a utility pole, which event is not reasonably foreseeable in the absence of special circumstances. Because, as a matter of law, the collision with the pole and the subsequent fall of the lines were not reasonably foreseeable, defendant neither owed nor breached any duty to plaintiffs." *Id*.

This Court granted plaintiffs' Application for Transfer, pursuant to Rule 83.04.

POINTS RELIED ON

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF UNION ELECTRIC COMPANY, BECAUSE UNION ELECTRIC NEITHER OWED NOR BREACHED ANY DUTY TO PLAINTIFFS, IN THAT IT IS UNDISPUTED THAT THE LINES FELL BECAUSE A TRUCK LEFT THE ROAD AND STRUCK A UTILITY POLE LOCATED NINE FEET SEVEN INCHES OFF THE TRAVELED PORTION OF THE ROAD, AND AS A MATTER OF LAW, NEITHER THE COLLISION NOR ITS CONSEQUENCES WERE REASONABLY FORESEEABLE.

Clinkenbeard v. City of St. Joseph, 321 Mo. 71, 10 S.W.2d 54 (1928)

Baker v. Empire Dist. Elec. Co., 24 S.W.3d 255 (Mo.App. 2000)

Rothwell v. West Cent. Elec. Co-op., Inc., 845 S.W.2d 42, 44 (Mo.App. 1992)

Noe v. Pipeworks, Inc., 874 S.W.2d 502 (Mo.App. 1994)

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF UNION ELECTRIC COMPANY, BECAUSE UNION ELECTRIC NEITHER OWED NOR BREACHED ANY DUTY TO PLAINTIFFS, IN THAT IT IS UNDISPUTED THAT THE LINES FELL BECAUSE A TRUCK LEFT THE ROAD AND STRUCK A UTILITY POLE LOCATED NINE FEET SEVEN INCHES OFF THE TRAVELED PORTION OF THE ROAD, AND AS A MATTER OF LAW, NEITHER THE COLLISION NOR ITS CONSEQUENCES WERE REASONABLY FORESEEABLE.

Standard of Review

Review of a summary judgment is essentially *de novo*. The court uses the same criteria that the trial court used in its initial determination of the propriety of the judgment. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp*., 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment will be upheld on appeal if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. *ITT Commercial Finance Corp*., 854 S.W.2d at 377; *American Standard Inc. Co. v. Hargrave*, 34 S.W.3d 88, 89 (Mo. banc 2001).

In response to a motion for summary judgment, the non-movant cannot rest upon mere allegations or denials but, by affidavit or otherwise, must set forth specific facts showing that there is a genuine issue for trial. *ITT Commercial Finance Corp*.,

854 S.W.2d at 381. A genuine issue exists only where "the record contains competent materials that evidence two plausible, but contradictory, accounts of the essential facts." *Id.*

The central issue on this appeal is whether plaintiffs identified specific facts from which a jury could find that the collision with the pole and the subsequent fall of the lines were reasonably foreseeable so as to impose on Union Electric a duty to take precautions against such an occurrence. They did not. Plaintiffs made no response to defendant's Statement of Uncontroverted Facts and submitted no exhibits or affidavits that would contradict any of Union Electric's factual statements. As a result, all of defendant's stated facts are deemed admitted. *See* Rule 74.04(c)(2). *See also Weiss v. Rojanasathit*, 975 S.W.2d 113, 120 (Mo. banc 1998). Plaintiffs did not set out any additional facts in the manner prescribed by Rule 74.04(c)(2) and therefore have not preserved any claim of a genuine dispute as to any material fact. *See Wichita Falls Production Credit Ass'n v. Dismang*, 78 S.W.3d 812, 815 (Mo. App. 2002).

There is no dispute that the lines landed on Mr. Grattan's car only because a trash truck left the road, due to its driver's inattention, and struck and broke a utility pole that was located more than 9 feet off the traveled portion of the road and had been in place approximately 28 years. The force of the collision resulted in the breakage of four additional poles. As a matter of law, such an incident was not reasonably foreseeable and in favor of Union Electric.

The Truck's Collision With the Pole Was Not Reasonably Foreseeable

As a matter of law, an electric utility is not obligated to guard against every possible injury but only against those which are reasonably foreseeable. As the court observed in *Rothwell v. West Cent. Elec. Co-op, Inc.*, 845 S.W.2d 42, 44 (Mo.App. 1992): "This duty is not a duty to protect against all possible injuries. Rather, the duty is to protect the plaintiff from all reasonably foreseeable injuries…There are some injuries for which the defendant is not liable because plaintiff's mishap is not reasonably foreseeable, and thus no duty is obliged." The test for foreseeability is "whether the defendant should have foreseen a risk in a given set of circumstances." *Lopez v. Three Rivers Elec. Co-op, Inc.*, 26 S.W.3d 151, 155 (Mo. banc 2000).

The leading Missouri case concerning a utility's liability for injuries resulting from a vehicle's collision with a utility pole is *Clinkenbeard v. City of St. Joseph*, 321 Mo. 71, 10 S.W.2d 54 (1928). There the court held that the utility was not liable for injuries sustained when a vehicle left the traveled portion of the road, went over a six to eight inch curb, traveled about three feet and struck a utility pole. The court observed that the pole did not "endanger anyone using such traveled and improved portion of the street in the ordinary manner and for the purpose for which such roadway was intended and improved." *Clinkenbeard*, 10 S.W.2d at 62.

In numerous subsequent cases, the Missouri courts have applied the principle of *Clinkenbeard* and have held that a utility generally is not obligated to anticipate that a vehicle will leave the traveled portion of the roadway and collide with a utility pole. *See*

Baker v. Empire Dist. Elec. Co., 24 S.W.3d 255, 263 (Mo.App. 2000) (utility not liable to plaintiffs who were injured when electric lines fell on their vehicle after another vehicle collided with a utility pole seven feet off the traveled portion of the roadway); *Dokmo v. Southwestern Bell Telephone Co.*, 965 S.W.2d 953 (Mo.App. 1998) (utility not liable to plaintiff injured when vehicle struck utility pole five feet off traveled portion of the roadway); *Noe v. Pipeworks, Inc.*, 874 S.W.2d 502, 504 (Mo.App. 1994) (utility not liable to plaintiff injured when motorcycle struck utility pole 40 to 56 inches from paved portion of road); *Godfrey v. Union Elec. Co.*, 874 S.W.2d 504 (Mo.App. 1994 (utility not liable to passenger injured when vehicle struck utility pole five feet off traveled portion of the roadway); *Rothwell v. West Cent. Elec. Co-op, Inc.* 845 S.W.2d at 44-45 (electric cooperative not liable for death of man who contacted electric line after vehicle collided with utility pole nine to eleven feet off traveled portion of the roadway); *Scaife v. Kansas City Power and Light Co.*, 637 S.W.2d 731 (Mo.App. 1982) (utility was not liable to plaintiff, who alleged injuries resulting from the fall of a transformer after a vehicle's off-road collision with a pole). *See also Dowell v. City of Hannibal*, 357 Mo. 525, 210 S.W.2d 4, 5 (1948) (city was not required to anticipate or guard against the possibility that a car would leave the road and proceed down an incline).

Plaintiffs rely on a couple of sentences in *Hanson v. Union Elec. Co.*, 963 S.W.2d 2, 5 (Mo.App. 1998), suggesting a distinction between the duty owed to drivers and passengers in a vehicle that collides with a utility pole and the duty owed to other

persons. (App. Brief, p. 6) These statements are mere dicta. The *Hanson* decision turned on the fact that the pole in question had a history of "being hit by drivers who failed to properly negotiate the curve of the road." *Hanson*, 963 S.W.2d at 5. In fact, the pole had been hit on at least three prior occasions within the past 18 years, and one of the plaintiffs had told the utility that the pole needed to be moved because of its dangerous location. *Id*. No move was made, and a subsequent collision resulted in the pole's breaking, dropping lines onto the plaintiffs' dusk-to-dawn light, and creating an electrical surge that burned down plaintiffs' house.

In the present case, plaintiffs have not alleged, nor are there any facts to suggest, that the pole had ever before been struck or broken or that such an occurrence was reasonably foreseeable. The only evidence is that the pole bore the date 1963 and therefore would have been installed in 1963 or 1964. (L.F. 125-26, ¶¶ 3, 4).

Despite the dicta in *Hanson*, there is no basis for a distinction between the duty owed to a driver or a passenger in a vehicle that collides with a utility pole and the duty owed to someone not involved in the collision. The reason that no duty is owed to a passenger in a vehicle that collides with a pole is not that the passenger, by being present in the vehicle, has become an outlaw whose safety can be ignored. Rather, no duty is owed to the passenger, the driver or anyone else, because, absent special facts, such as frequent prior collisions with a particular pole, an off-road collision with a utility pole is not reasonably foreseeable.

In *Scaife v. Kansas City Power & Light Co.*, 637 S.W.2d 731 (Mo.App. 1982), as in the present case, the plaintiff alleged injuries resulting from a series of events, beginning with a vehicle's collision with Kansas City Power & Light Company's transformer pole. The transformer was knocked loose and exploded. Plaintiff was not in the vehicle that collided with the pole, but was in her home when the collision occurred. She was knocked to the floor by the explosion. The pole was located in the utility's permit area two and a half feet from the street's curb. Citing *Dowell v. City of Hannibal*, the court observed that that decision "made it clear that a public entity does not have a duty to preclude all possibility of accident nor guard against the more unusual and extraordinary occurrences." *Scaife*, 637 S.W.2d at 733. The court affirmed summary judgment for the utility.

Although plaintiffs seek to distinguish *Scaife* on the grounds that the plaintiff relied on bare allegations and failed to respond to affidavits, exhibits and depositions filed by the defendant (App. Brief, p. 11), the plaintiffs in the present case have not contradicted any of Union Electric's factual statements. Instead, plaintiffs rely on *Thornton v. Union Elec. Co.*, 72 S.W.2d 161 (Mo. App. 1934) and argue that it is a matter of "common knowledge" that motor vehicles traveling on highways frequently get out of control, especially at curves. (App. Brief, pp. 8-9).

The plaintiffs in *Thornton*, however, presented evidence "that it was a frequent occurrence for automobiles using Highway 61 to run off the concrete payment and

collide with defendant's poles previous to the accident involved in this suit," 72 S.W.2d at 165. In contrast, as the trial court noted, plaintiffs in the present case neither alleged nor showed "any such special fact pattern." (Judgment, App. Brief, p. A15).

Plaintiffs' reliance on *Thornton* is misplaced for several reasons. As the trial court noted, the *Thornton* court's assumption that it is "common knowledge" that vehicles traveling on highways frequently get out of control and run off the pavement is "fundamentally inconsistent with the Supreme Court's ruling in *Clinkenbeard*, which held that such collisions are not reasonably foreseeable." (Judgment, App. Brief p. A15). In addition, to the extent *Thornton* suggests that a submissible case can be made simply on such "common knowledge," it is inconsistent with the decision in *Dowell v. City of Hannibal*, 210 S.W.2d at 5, in which the court held that it was "beyond a reasonable requirement to say that the defendant City should have anticipated such extraordinary occurrences" as a truck's leaving the road and proceeding down an incline.

More importantly, the *Thornton* decision is distinguishable on its facts. The court in *Thornton* had evidence before it of several prior collisions with poles in the area. *Thornton*, 72 S.W.2d at 166. In contrast, plaintiffs in the present case have neither alleged nor shown any such prior collisions. In addition, the alleged negligence in *Thornton* was stringing across a highway an uninsulated guy wire which, if it fell, "would necessarily fall across the highway and at the same time come in contact with the high-tension wires on the transmission line." *Thornton*, 72 S.W.2d at 165. As plaintiffs

recognize (L.F. 169), the electric lines in the present case did not cross the highway and were not configured like the lines in *Thornton*. In the present case, the lines fell on the roadway only because five poles broke due to the trash truck's forcible collision with a pole more than nine feet off the road. Moreover, Plaintiffs have not alleged any defect in the configuration of the lines and poles. In short, *Thornton* is a unique decision based on a peculiar fact pattern not present here. *See Baker v. Empire District Electric Co.*, 24 S.W.3d at 263 (noting that "[t]he facts in *Thornton* are unique" because the issue was "the safety of the support system for the pole").

Plaintiffs are also in error in attempting to distinguish *Baker v. Empire Dist. Elec. Co.*, 24 S.W.3d 255 (Mo.App. S.D. 2000) on the grounds that the plaintiffs in that case were the driver and passenger of a vehicle involved in a collision with another vehicle that struck a pole. (App. Brief p. 12). In *Baker*, the most recent decision arising out of a vehicular collision with a utility pole, the court affirmed summary judgment for the electric utility where the plaintiffs alleged that another vehicle, with which their vehicle collided, struck and broke a utility pole, bringing down electric lines on the plaintiffs' car. The *Baker* plaintiffs alleged that their vehicle had become energized by the downed electric lines and that they had suffered injuries from electricity entering their bodies. *Baker*, 24 S.W.3d 257. They alleged that the utility was negligent, not only in its placement of the pole, but also "in failing to properly equip the wires so that they continued to conduct electricity even after the pole was knocked down following the

accident." *Baker*, 24 S.W.3d at 258. Although the plaintiffs in *Baker* attempted to distinguish cases such as *Clinkenbeard*, *Noe*, *Godfrey* and *Rothwell*, on the grounds that the injuries in those cases had not resulted from the escape of electricity, the court held that the critical facts were "that the utility pole that was struck was off the traveled portion of the road" and that the injuries that formed the basis of the plaintiffs' claims were the consequence of an automobile's striking the pole. *Baker*, 24 S.W.3d at 260.

The court in *Baker* mentioned the fact that the plaintiffs' vehicle had been involved in a collision with the car that struck the pole, because those were the facts of that case. There is no basis, however, for a distinction between the principles applied in *Baker* and those applicable in the present case. The driver and passenger in *Baker* were not denied recovery on any theory that they were culpable in having been involved in a collision with the other vehicle. In fact, the court in *Baker* found no need to discuss any issue of fault on the part of the plaintiffs. Rather, the court followed the decision in *Scaife*, holding that there is no duty to take precautions against an off-road collision with a utility pole, because in the absence of special circumstances, not present in any of these cases, such a collision is not reasonably foreseeable. *Baker*, 24 S.W.3d at 264.

In the present case, there is no indication of any prior collision with the pole, nor are there any other circumstances suggesting that either a collision with the pole or the fall of electric lines onto the road was reasonably foreseeable. Accordingly, the trial court properly granted summary judgment to defendant.

Union Electric Owed No Duty to Plaintiffs

Plaintiffs' theories are that Union Electric was negligent either in failing to adequately insulate or isolate its electric lines or failing to adequately equip and maintain adequate ground-fault or circuit interrupting equipment to "de-energize said electric lines in the event of a fault, disruption of the lines, or falling onto the public streets and highway of the state of Missouri." Each of these theories requires the plaintiffs to demonstrate that the line's contact with Mr. Grattan's car was reasonably foreseeable.

Because it is undisputed that the lines fell only because the trash truck had struck and broken the utility pole, causing four additional poles to fall, plaintiffs cannot meet their burden. "An electric company is not an insurer of persons and its liability is determinable upon principles of negligence." *Donovan v. Union Elec. Co.*, 454 S.W.2d 623, 626 (Mo.App. 1970). Its duty is "to exercise the highest degree of care either to insulate its transmission lines adequately or to isolate them effectively wherever it reasonably may be anticipated that others may lawfully come into close proximity to its lines and thereby may be subjected to a reasonable likelihood of injury." *Tellis v. Union Electric Co.*, 536 S.W.2d 742, 745 (Mo.App. 1976). Plaintiffs argued in their application for transfer that affirming the summary judgment in this case would require the abrogation of *Erbes v. Union Co.*, 353 S.W. 2d 659 (Mo. 1962). There is no support for that theory.

The term "isolation" refers to placement of the lines "beyond the range of contact with persons rightfully using such streets, highways or places." *Erbes vs. Union Electric*

Co., 353 S.W.2d 659, 664 (Mo. 1962). *See also Glastris v. Union Electric Co.*, 542 S.W.2d 65, 70 (Mo.App. 1976) ("any electric utility may discharge its duty either by insulating its wires or by isolating them by placement beyond probably breach"). There is no contention that the lines were not isolated prior to the trash truck's collision with the pole. Plaintiffs argue that the mere presence of energized lines on the road demonstrates a breach of duty, "regardless of how said live wires happen to get on the highway" (App. Brief, p. 8). Plaintiffs' argument is not supported either by *Erbes* or by any other Missouri decision. *Erbes* did not involve a downed line or an off-road collision with a pole. The Missouri courts have long recognized that if a line falls for some reason not attributable to the utility, the utility is "entitled to a reasonable opportunity to discover and locate" the problem and to correct it. *Brown v. Consolidated Light, Power & Ice Co.*, 137 Mo. App. 718, 109 S.W. 1032, 1037 (1908). In the present case, as the Court of Appeals noted in its opinion there was "no allegation in the summary judgment record that defendant became aware of the fallen line prior to plaintiff's automobile's contact with the downed wires." (Opinion, p. 6).

As the court observed in *Rothwell v. West Cent. Elec. Co-op., Inc.*, 845 S.W.2d 42, 44 (Mo.App. 1992), a utility's duty is "not a duty to protect against all possible injuries" but a duty "to protect the plaintiff from all reasonably foreseeable injuries." In *Rothwell*, the court affirmed summary judgment in favor of the electric cooperative where the decedent's vehicle had veered off the road at a curve, crossed the road, and struck a

utility pole, breaking the pole and bringing down electrical wires. The decedent left his truck, walked into the roadway, contacted the downed lines, and was electrocuted. The court held that "this type of accident involving the pole is not reasonably foreseeable." *Rothwell*, 845 S.W.2d at 44. *See also Scaife v. Kansas City Power & Light Co.*, 637 S.W.2d at 733 (noting that an electric utility "is not, however, an insurer of public safety…and is not required to isolate or insulate its wires beyond where one may lawfully or reasonably be expected to be"). Plaintiffs cannot ignore the essential element of foreseeability simply by pleading a theory based on something other than the pole's location.

Although plaintiffs contend that Union Electric should have used different ground-fault or circuit interrupting equipment, they did not present facts supporting that theory in the manner required by Rule 74.04(c)(2). Even if the Court were to disregard the requirements of the rule and attempt to discern a fact issue in the few pages of expert testimony attached to plaintiffs' response to the motion for summary judgment, the testimony does not support plaintiffs' contention in their application for transfer that their expert described deenergizing equipment that was "as simple in concept as the 'ground-fault interrupting' electrical outlets found in every bathroom or outdoor receptacle." (Transfer App. p. 3). Plaintiffs' expert simply assumed that because Mr. Grattan said that he sustained a shock, the lines must have remained energized at some unidentified point, between the circuit breaker's initial operation and its locking out completely after 175

seconds. (L.F. 146, Nabuors Depo., pp. 85-87). Although plaintiffs' expert stated that additional and different equipment and different settings should have been used, he could not say that implementing the changes he suggested would have produced a result different from what he believes occurred. Rather, he acknowledged that the fault current is not constant, that resistance can increase, making it harder for any system to detect fault current, and that any detection system has a threshold and will not operate unless that threshold is exceeded. (L.F. 146, Nabuors Depo., pp. 87-88). In short, plaintiffs' expert's testimony was not sufficient to create a genuine issue of material fact, even if it had been presented in accordance with Rule 74.04(c)(2).

The Missouri courts have never held that an electric utility has a duty to use circuit interrupting equipment or otherwise fuse for a fault current. In any event, "there is no negligence in not guarding against a danger which there is no reason to anticipate." *First Electric Cooperative v. Pinson*, 642 S.W.2d 301, 303 (Ark. 1982) (reversing a verdict based on a theory that a utility was required to fuse for fault current, where there was no evidence that contact with the electric lines was reasonably foreseeable). In the present case, neither the collision with the pole nor the resultant fall of the lines was reasonably foreseeable. As a result, there was no duty to take precautions to avoid the consequences of such an occurrence. *See Baker v. West Central Elec. Co-op., Inc.*, 24 S.W.3d at 264.

Plaintiffs rely on *Calderone v. St. Joseph Light & Power Co.*, 557 S.W.2d 658, 667-68 (Mo.App. 1977) and *Kidd v. Kansas City Light & Power Co.*, 239 S.W. 584

(Mo.App. 1922) to argue that Union Electric had a duty "to timely discontinue or de-energize the electric current to the downed power lines." (App. Brief, p. 11). Both cases are inapposite. In each, the utility had actual notice that the line had fallen but failed to take appropriate action.

In *Kidd*, the utility was aware of a break in its wire, but left the broken, energized wire in the street for 45 minutes to an hour. *Kidd*, 239 S.W.2d at 585. In *Calderone*, the defendant's load dispatcher testified that "he had it within his power by the manipulation of selector buttons to discontinue the deadly current to the live wire suspended over the highway within fifteen seconds after notice but for reasons of his own failed to do so." *Calderone*, 557 S.W.2d at 663. *See also Baker v. Empire District Electric Co.*, 24 S.W.3d at 261 ("The power company had been notified of the downed line prior to the injury to Mr. Calderone, but had not discontinued current to the downed wire."). There are no facts in the present case suggesting that Union Electric became aware of the fallen line prior to Mr. Grattan's alleged injury.

The trial court correctly held that "*regardless* of the bases of plaintiffs' theory of negligence, the unavoidable fact still is that Plaintiffs' claims all stem from an off-road vehicle collision with a utility pole, an event which Missouri courts have repeatedly held is, absent special circumstances, not reasonably foreseeable." (Judgment, App. Brief, p. A16) (emphasis in original).

CONCLUSION

Because, as a matter of law, the collision with the pole and the subsequent fall of the lines were not reasonably foreseeable, Union Electric neither owed nor breached any duty to plaintiffs. The trial court properly entered summary judgment in favor of Union Electric, and its judgment should be affirmed.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the Substitute Brief of Respondent Union Electric Company and a disk containing that brief were sent via first class mail, postage prepaid on this 29th day of May, 2004, to Stephen H. Ringkamp, Scott L. Kolker, The Hullverson Law Firm, 1010 Market Street, Suite 1550, St. Louis, Missouri 63101.

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CERTIFICATE OF COMPLIANCE

In accordance with Rule 84.06 and Local Rules 360 and 361, the undersigned certifies that Appellant's Brief complies with the limitations contained in Rule 84.06(b) and that the number of words in this Brief is 6101 words, as counted by the word processing system used in preparing this Brief, Microsoft Word '97. The undersigned further certifies that the disk accompanying this Brief has been scanned for viruses and that it is virus-free.

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